Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GREEN CONSTRUCTION COMPANY AND THE AMERICAN INSURANCE COMPANY,

Petitioners,

v.

FRED VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where an indemnitor doing business with the State of West Virginia cannot be joined in an action in the West Virginia Court of Claims, but may intervene as a matter of right, and where the indemnitor has been vouched the defense by the State/indemnitee, but the indemnitor refuses either to intervene or to defend, can the indemnitor be precluded from disputing facts established in the action?

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STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

Petitioners Green Construction Company ("Green") and The American Insurance Company ("American") appeal a decision of the West Virginia Supreme Court of Appeals affirming the judgement of the Circuit Court of Kanawha County, West Virginia. The Circuit Court held that Green and American owed a contractual duty to indemnify and hold harmless the Division of Highways ("Highways") from an award of judgment made in favor of Elmo Greer & Sons, Inc. ("Elmo Greer") in West Virginia Court of Claims action CC-87-444. In an opinion issued December 11, 1992, the Court of Claims made an award to Elmo Greer in the sum of $1,214,088.68. The parties in the circuit court action, Green, American and Highways, moved for summary judgment on the indemnification issue, and after oral arguments on June 12, 1992 and extensive briefing with affidavits, the Circuit Court, by Order entered August 22, 1994, granted summary judgment in favor of Highways and awarded Highways judgment against Green and American in the amount of $1,214,088.68. After further oral arguments at a hearing on November 18, 1994 and additional briefing by the parties, the Circuit Court denied Green and American's Motion for Relief from Judgement.[1]

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[1] Petitioners' statement, *Petition, p. 11, repeated in Petition, note 10,* that the Circuit Court of Kanawha County gave preclusive effect to the Court of Claims decision "[w]ithout a hearing or any opportunity to amplify the proper legal effect" of that decision ignores these hearings and the extensive briefs, reply briefs and supplemental briefs by the parties.

The West Virginia Supreme Court of Appeals affirmed the judgement of the Circuit Court by opinion filed December 8, 1995, and denied Petitioners' Petition for Rehearing on January 24, 1996.

FACTS

This case concerns the duty of Green and American to indemnify Highways for losses sustained by Highways as a result of Green Construction's breach of contract in failing to properly perform a road construction contract.[2] On May 22, 1984, Elmo Greer was awarded a contract by Highways for construction of Highway Project No. ID-64-4(71)123. The scheduled completion date was June 30, 1986. Green was to install a box culvert and perform special embankment work in the same area under its contract for Project No. ID-64-4(73)124. Except for a small area of overlap, the two projects differed both in location and in sequencing of work and times of completion for work items. Elmo Greer could not complete their project until Green's work was completed.

After several requests by Highways to Green that they comply with their contractual obligations, and after Highways granted deadline extensions to Green that were also not met, Elmo Greer agreed to help Green complete its job. Several errors made by Green were discovered by Elmo Greer when they began their project.

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[2] *VanKirk v. Green Construction Co.*, 466 S.E.2d 782 (W. Va. 1995). See also *Elmo Greer & Sons, Inc. v. Division of Highways*, No. CC-87-444 (W.Va.Ct. Cl. Dec. 11, 1992)

Elmo Greer had to correct these errors before it could proceed. As a result of these delays by Green, *Elmo Greer & Sons, Inc.*, at 5-6, Elmo Greer suffered financial losses arising out of the delays in its own work and additional work it had to perform, causing a postponement of new projects and the carrying over of work into the new construction season.

Elmo Greer made a claim of $3,211,602.59 against Highways in the West Virginia Court of Claims. Highways' contract with Green included a save harmless clause in which Green agreed to save Highways harmless from liability that may accrue by reason of the acts or negligence of Green. In addition, American issued a surety bond posted for Green Construction Co., in which Green joined as principal, to save and keep harmless Highways from all losses caused by Green. However, neither Green nor American agreed to defend Highways when requested, nor did they appear and dispute their obligation to indemnify Highways.

Contrary to the implication in Petitioners' Statement of the Case, *Petition, p. 2,* neither Green nor American informed Highways at the time of tender that their decision to decline tender of the defense was based on the belief that Highways' failure to coordinate was the cause of Greer's damages, but only later during the Circuit Court action did they raise the issue. Petitioners' representation, *Petition, p. 5,* that Highways took no action to

address the coordination of contractor work is also incorrect.[3]

SUMMARY OF THE ARGUMENT

Throughout much of their brief Petitioners pose a false dilemma. They argue that as indemnitors with an alleged conflict of interest with the indemnitee, they could not both accept tender of the defense of the indemnitee and at the same time protect their own interests by showing that the indemnitee's fault defeats or offsets the indemnification obligation. As the West Virginia Supreme Court of Appeals noted, Petitioners could elect which course to take: accept tender of the defense or intervene and dispute the existence and extent of the obligation to indemnify. Petitioner's dilemma arises out of their mischaracterization of the obligations as conjunctive rather than disjunctive.

Petitioners further argue the proposition that where an indemnitor alleges a conflict of interest with an indemnitee as to issues forming the basis of the indemnitee's liability to a third party, and does not appear, due process

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[3] *VanKirk*, 466 S.E.2d at 784: "As the result of delays, DOH asked Green several times to comply with its contractual obligations. DOH granted deadline extensions to Green that were not met." See also *Elmo Greer & Sons, Inc. v. Division of Highways*, No. CC-87-444 (W.Va.Ct. Cl. Dec. 11, 1992), text at *Petition*, Appendix, at 39a: " . . . meetings were conducted on a monthly basis, and at each meeting respondent [Highways] urged Greer to be prepared to begin its work on the fill as Green would be completing the box culvert and select embankment."

requires that the indemnitor only be precluded as to those issues where there was no conflict. However, legal commentators and authorities recognize the need for an exception to this principle where, due to jurisdictional or other limitations, the indemnitee cannot implead or join the indemnitor in the principal action. Where, as here, neither the indemnitee nor the party claiming against the indemnitee can hail the indemnitor into the forum with jurisdiction to hear the claim, and where the indemnitor declines tender of the defense and refuses to intervene and litigate facts which it alleges defeat indemnification, so that the indemnitee is exposed to inconsistent judgements, it is fair to give preclusive effect to issues decided in that forum.

Finally, the Petitioners overstate the reach and implications of the opinion of the West Virginia Supreme Court. That Court's holding[4] is expressly limited to proceedings in the West Virginia Court of Claims, a court with limited jurisdiction and one, unlike other state and federal courts, in which impleader and joinder are not available to the State/indemnitee.

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[4] " . . . we hold that when the State or one of its agencies is sued in the Court of Claims and the State has an indemnity agreement with a third party indemnitor, upon reasonable notice given by the State or its agency to defend under the indemnity agreement, the indemnitor must either defend the suit or intervene under Rule 24(a)(2) of the West Virginia Rules of Civil Procedure and assert any defenses it claims would enable it to avoid the duty to defend the indemnitee under the indemnity agreement." *VanKirk*, 466 S.E.2d at 793.

REASONS FOR DENYING THE WRIT

A FALSE DILEMMA POSED

The very heart of Petitioners' argument is their assertion that they were denied their day in Court in violation of due process. They acknowledge that they received timely notice of Elmo Greer's claim against Highways in the Court of Claims and that Highways tendered the defense of the claim. They argue, however, that taking part in the proceeding would not afford them a meaningful opportunity to defend because they faced an irreconcilable conflict in both defending Highways against Elmo Greer's claims and asserting their claim that no indemnification was owed Highways because Highways' acts or omissions caused Elmo Greer's harm.

Petitioners' position is directly contrary to West Virginia statutory law, the Rules of the West Virginia Court of Claims, the West Virginia Rules of Civil Procedure and past holdings of the West Virginia Supreme Court of Appeals. West Virginia Code § 14-2-13(1) provides that the Court of Claims shall have jurisdiction of " . . . [c]laims and demands . . . ex contractu . . . against the State or any of its agencies. . . . " The same article further provides: "The court shall so conduct the hearing as to disclose *all material facts and issues of liability*. . . . " W. Va. Code § 14-2-16(4) (emphasis added). West Virginia Court of Claims R. Prac & Pro., Rule 18 expressly states that "[t]he Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary." Thus, as the West Virginia Supreme Court observed, W. Va.

Rule Civ. P. Rule 24 intervention was available to Petitioners to raise in the Court of Claims, investigate through discovery, and address at hearing the issues it claims were precluded.[5]

The West Virginia Supreme Court of Appeals has unequivocally stated, in Syllabus Point 2 of *McCrossin v. W. Va. Board of Regents*, 355 S.E.2d 32 (W. Va. 1987) that: "[a] knowledgeable party contracting with a state agency has, in effect, agreed to submit *any disputes* with the contracting state agency for resolution by the court of claims." (emphasis added) In *Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 133 (W. Va. 1987), the West Virginia Supreme Court observed:

> Though the court of claims is not a judicial body, it clearly operates in a judicial capacity. Its judges are lawyers, who serve as neutral and detached decision-makers. Longstanding due process protections such as notice and an opportunity to be heard are scrupulously applied. The court has adopted the West Virginia Rules of Civil Procedure where they are not inconsistent with its own procedures. Moreover, the judges make legal and factual findings from which they render a final and binding decision. Thus, the

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[5] The court stated: "This intervention procedure enables an indemnitor to have a determination as to whether under the express indemnity language a defense is required of the state agency which has been sued in the Court of Claims. We deem this type of intervention to be one of right where an intervenor has been put on notice by the indemnitee that it should assume the defense in the Court of Claims as occurred here." *VanKirk*, 466 S.E.2d 782, 792. However, the court neither expressly nor impliedly recognizes in *the State* or *Greer* similar rights to join or implead Green and American.

> question of whether the court acts as a judicial body must be answered in the affirmative. . . . We note that the hearings conducted before the court of claims possess all of the indicia of an adversarial judicial proceeding. . . . The parties had available to them various methods of pre-trial discovery, including interrogatories and depositions. Rule 14, Ct.Cl.R.Prac. & Pro. They were authorized to produce witnesses and exhibits on their behalf, to procure evidence through compulsory process, and to cross-examine the witnesses of opposing parties.

In *Mellon-Stuart*, the underlying court of claims case involved two contractors as parties claiming against the State, and a prominent issue in that case, as in the instant case, was the responsibility for coordinating the various prime contractors. Nothing in the instant case, save Petitioners' adamant refusal after notice, prevented Petitioners from intervening in the court of claims action, complying with their contractual obligation to defend Highways to the extent consistent with their own interests, and raising issues concerning indemnification and apportionment of liability between Petitioners and Highways.

Moreover, the West Virginia Supreme Court, in its decision below, recognized no obligation of Petitioners or similarly situated indemnitors to accept tender of the defense where a conflict was alleged. Petitioners could in the alternative appear and dispute those issues of fact and law they claimed diminished or extinguished the indemnity obligation.

BINDING AN INDEMNITOR WHO REFUSES TO APPEAR

While noting that the West Virginia Court of Claims has adopted the Rules of Civil Procedure, 359 S.E.2d at 133, the *Mellon-Stuart* Court went on to observe that such adoption "does not mean that these rules can supercede statutory provisions governing the court. . . . [I]t may not adopt rules which are inconsistent with or alter its statutory authority." 359 S.E.2d at 135. Consequently, since that court has jurisdiction only of claims against the State, the State may be hailed into, but cannot hail other parties into, proceedings before the court. This jurisdictional limitation on Rule 14 impleader and Rule 19 joinder places the State, as indemnitee, in a position where it must answer to claims against it in the Court of Claims but has no means to join or implead an indemnitor in the same proceeding for determination of issues related to the duty to indemnify.

Petitioners argue, *Petition*, pages 14-22, that where an indemnitor alleges a conflict of interest with an indemnitee as to issues forming the basis of the indemnitee's liability to a third party, and does not appear in the original action, due process requires that the indemnitor only be precluded as to those issues where there was no conflict. This general proposition finds support in a number of court opinions and commentaries,[6] as Petitioners note, and is consistent with pronouncements of

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[6] See, e.g., *Barber-Greene Co. v. Bruning Co.*, 357 F.2d 31, 35 (8th Cir. 1966); Restatement (Second) of Judgements § 57; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4452.

the West Virginia Supreme Court.[7] Significantly, Petitioners recognize, *Petition*, at pages 21-22, that:

> . . . Rule 14 impleader and Rule 19 joinder enable parties to a proceeding to bring third parties into a proceeding, and thus bind them to the judgement with well settled principles of estoppel. Importantly, however, the onus of Rules 14 and 19 rests upon the existing parties to the proceeding, precisely where the onus belongs if estoppel is desired. The burden of joinder, if desired, *should* be borne by the party seeking to adjudicate the interests of an absent party.

Where, however, the parties to the proceeding cannot join or implead the absent party, as in the proceeding in the Court of Claims, below, the burden becomes a bar, and the equities shift.

Restatement (Second) of Judgements § 57 (1982), p. 82-83, provides:

> When the conflict of interest makes it inappropriate for the indemnitor to assume defense of the indemnitee, the indemnitee faces a serious risk that he may unjustly lose his indemnity protection. The indemnitor is not bound by the determinations against the indemnitee, nor estopped from contending that the indemnitee was improperly held liable to the injured party. Hence, it is possible that there will be inconsistent determinations of the issues common to the injured person's action against the indemnitee

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[7] See, e.g., *Hill v. Joseph T. Ryerson & Sons, Inc.*, 286 S.E.2d 296 (W. Va. 1980); *Valloric v. Dravo Corporation*, 357 S.E.2d 207 (W. Va. 1987).

> and the latter's action against the indemnitor, with the result that the indemnitee is held liable to the injured person but also held not entitled to indemnification. The indemnitee's proper remedy in this situation is to implead the indemnitor, a remedy available in the modern procedure now adopted in most jurisdictions. *In some circumstances, impleader may be unavailing unless the indemnitor voluntarily submits to the jurisdiction of the court. This can occur as a result of service of process limitations or, especially with regard to insurers, when the indemnitor successfully asserts that he cannot be sued until the claim against the indemnitee is reduced to judgement. Such a refusal to submit to jurisdiction or abide by the outcome of the action against the indemnitee may be a proper basis for estopping the indemnitor from later contesting the determinations in the principal action.* (emphasis added)

See also 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4452, "Duty to Participate," at page 445 (1981):

> Strong arguments can be made that preclusion by voucher should be unavailable *whenever interpleader is possible.* (emphasis added)

continuing, *Id.*, at note 11:

> After noting that a conflict of interests between the defendant and the warrantor made vouching inappropriate, Judge Aldisert has commented that while vouching remains 'marginally viable' following adoption of Rule 14 impleader procedures, the need for consistent and efficient litigation is better served by impleader, *and has noted that it has at least been suggested that vouching might be limited to cases in which impleader is*

> *not possible. Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727, 735 & nn. 14, 15 (C.A.3d 1971). (emphasis added)

and

> Vouching need be preserved only for cases in which lack of personal jurisdiction or other limitations make impleader unavailable.

18 Wright, *supra*, at 445-446, continuing, at note 12:

> . . . . As modern transactional bases of personal jurisdiction come to be perfected, it seems likely that personal jurisdiction should be available in almost all of the circumstances that would support vouching. *Other limitations may restrict impleader procedure as well, particularly in state practice*. . . . (emphasis added)

Universal American Barge Corp. v. J-Chem, Inc., 946 F.2d 1131 (5th Cir. 1991), relied on by Petitioners, *Petition*, p. 19, is inapposite. In that case Universal American Barge Co., a shipper, contracted to carry bags of flower to Egypt. In a separate agreement the shipper contracted with J-Chem, Inc. to fumigate the cargo to prevent insect infestation. During transport the fumigation pellets settled together in the hold of the ship, and a chemical reaction occurred which caused a fire. The Egyptian purchaser sought arbitration under the terms of the contract with the shipper, and the shipper tendered defense of the claim to the fumigator.

Unlike the instant case, which dealt with express contractual indemnification, *Universal American Barge* involved a claim for implied indemnification by the indemnitee/shipper based on warranty of workmanlike

performance and common-law tort indemnification principles. More significantly, however, the original proceeding in *Universal American Barge* was an arbitration held pursuant to a contractual agreement between the shipper and the claimant to which the putative indemnitor (the fumigator) was not a party. Although the shipper/indemnitee tendered defense of the claim against it to the fumigator, no right of intervention *as a party* was available to the fumigator/indemnitor. It could only stand in the shoes of the shipper/indemnitee. Thus the fumigator/indemnitor lacked the choice available to Green and American in the Court of Claims proceeding below to accept tender of the defense or intervene as parties and assert issues that relieved them of the indemnity obligation.

Similarly, *Martin v. Wilks*, 490 U.S. 775 (1989), is distinguishable at a number of significant points. *Martin* dealt not with express contractual indemnity, nor even with a relationship of implied indemnity. The preclusion resisted in *Martin* was premised on a consent decree rather than a judicial finding of fact. Most importantly, the denial of issue preclusion was founded in the ability of the party seeking preclusion to employ third party practice to join or implead the party sought to be precluded.[8] Highways had no such ability in the court of claims proceeding below.

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[8] Chief Justice Rehnquist quotes with approval from *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934): " '. . . . *Unless duly summoned to appear in a legal proceeding*, a person not a privy may rest assured that a judgement recovered therein will not affect his legal rights,' " (emphasis added by this Respondent)

LIMITED APPLICABILITY OF THE DECISION BELOW

The West Virginia Supreme Court is cognizant of and sensitive to due process concerns raised by Petitioners. Indeed, that court, in an implied indemnity case, *Hill v. Joseph T. Ryerson & Sons, Inc.*, 286 S.E.2d 296 (W. Va. 1980), recognized that where an indemnitor *"has not been impleaded by an indemnitee* into the original suit brought against the indemnitee by the plaintiff, then the indemnitor is not bound by the judgement rendered against the indemnitee in the plaintiff's action." *Id.* at 302 (emphasis added). Unlike the instant case, in *Hill* the original proceeding was one where joinder and impleader were available to the party seeking preclusion. The *Hill* Court went on to conclude that where both notice and an opportunity to defend is not provided, the indemnitor may litigate the measure of damages recovered from the indemnitee in the former action and may set up any other defense available.

In the instant case the court has crafted a narrow holding expressly applying to proceedings in the West Virginia Court of Claims, a court where claimants and the

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Martin, at 763, continuing, *Id.*, at 765, "The parties to a lawsuit presumably know better than anyone else the nature and scope of the relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, *to place on them a burden of bringing in additional parties* where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the 'impermissible collateral attack' doctrine – the attribution of preclusive effect to a failure to intervene – is therefore quite inconsistent with *Rule 19* and Rule 24 practice." (emphasis added)

State lack joinder and impleader safeguards. The court's holding does not address courts of general jurisdiction where third party practice tools are available to all parties. This limited holding is in keeping with the recognized exception to the general rule proscribing the giving of preclusive effect to issues determined in the absence of an indemnitor, where that indemnitor had notice and an opportunity to appear and litigate issues wherein its interests conflicted with those of the indemnitee.

In addition to promoting finality of judgements and economic use of judicial resources, the decision of the West Virginia Supreme Court strikes a fair and equitable balance between the burden on a contractual indemnitor of mandatory intervention, on the one hand, and the inability of an indemnitee without power to join or implead the indemnitor to protect its interest on the other.

CONCLUSION

For the forgoing reasons Respondent, the West Virginia Commissioner of Highways, prays that this Honorable Court DENY THE WRIT.

Respectfully submitted,

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APPENDIX – TEXT OF STATUTES AND RULES INVOLVED

OFFICIAL CODE OF WEST VIRGINIA, 1931, as amended:
ARTICLE 2 – CLAIMS AGAINST THE STATE:

(cited in pertinent part)

§ 14-2-13. Jurisdiction of the court [of claims].

The jurisdiction of the court, except for the claims excluded by section fourteen [§ 14-2-14], shall extend to the following matters:

1) Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination. (1953, c. 18; 1967, c. 27.)

§ 14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims.

. . .

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of the claim.

§ 14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

. . .

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

WEST VIRGINIA COURT OF CLAIMS RULES OF PRACTICE AND PROCEDURE:

Rule 18. Application of Rules of Civil Procedure.

The Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary.